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In the Supreme Court of the United States

OCTOBER TERM, 1958

BILL WILLIAM PRIHOROFF, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. 53-56; Pet. A1-A4) is reported at 259 F. 2d 694.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1958 (R. 57; Pet. A5). A petition for rehearing was denied on November 21, 1958 (R. 58; Pet. A5). The petition for a writ of certiorari was filed on December 22, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, having failed to seek administrative review of his selective service classification

and to report for induction as ordered, may seek judicial review of that classification in a prosecution for failure to report for induction.

2. Whether the jurisdiction of the selective service board was sufficiently shown.

STATEMENT

An indictment returned on October 9, 1957, in the United States District Court for the Southern District of California, charged petitioner with willful failure to report for induction on October 12, 1956, in violation of the Universal Military Training and Service Act, 50 U.S.C. App. 462 (R. 3-4). In a trial before the court, petitioner was found guilty and sentenced to six months' imprisonment (R. 5-6).

At the trial, the government introduced into evidence a copy of petitioner's selective service file (R. 10; Ex. 1). The file showed that petitioner had registered with Local Board 71 in Fresno, California, on December 30, 1952, and for almost four years thereafter had resisted induction into the armed services (Ex. 1, 1, 14-15). During this period, Board 71 had four times reviewed and voted petitioner's I-A classification—the last two times (September 1955 and 1956) after petitioner had belatedly filed with the Board (in August 1955) a "Special Form for Conscientious Objector" (Ex. 1, 14, 15, 63-67). Petitioner had, on three occasions, failed to report for pre-induction physical examinations as ordered (Ex. 1, 14, 31, 20, 55, 58) and, on three occasions failed to report for induction as ordered (Ex. 1, 14, 15, 34, 60, 105), the last occasion being on October 12, 1956, as charged in the indictment (Ex. 1, 15). The Board had repeatedly found it necessary to investigate petitioner's whereabouts after he failed to respond to orders or to inquiries regarding his

conscientious objections (Ex. I. 29-30, 33, 51-53, 97-99). The United States Attorney in Los Angeles had twice declined to prosecute petitioner, allowing him an opportunity to clear his position with the Board (Ex. I. 44, 68). The file did not show any attempt on the part of petitioner to appeal from any one of the I-A classifications.

Petitioner moved for a judgment of acquittal, urging that the denial of his conscientious objector status was arbitrary and without basis in fact and that the government had failed to show that "jurisdiction existed in the Selective Service System * * * to issue * * * a valid induction order" (R. 4-5). In alleged support of the latter contention he offered the testimony of a selective service employee to the effect that three other selective service boards were housed in the same office building with Local Board 71 (R. 11-12). The government thereupon showed, with the aid of this witness, that in 1953 a legal boundary description (Ex. II) and map showed petitioner's address to be within the geographical jurisdiction of Board 71 (R. 15-20). When the court questioned the relation of this proof to 1952, the time of petitioner's registration, the government called to the stand a Mrs. Ford, the supervisor of the four local boards since their organization in 1948, who identified the legal description as an official one coming from State headquarters, used as a basis for administration by Local Board 71 and remaining unchanged during her years of service (R. 20-26, 32, 33). She also identified two maps drawn up from the legal description to show the geographical boundaries of the boards (R. 25-31).

The court denied the motion for acquittal, holding that this evidence established that petitioner was under

the geographical jurisdiction of Local Board 71, and that the court had no power to review the propriety of the action of the Board (R. 36-37). The court of appeals affirmed because of petitioner's failure to exhaust his administrative appeal remedies (R. 53-56).

ARGUMENT

1. Petitioner failed to seek review of his selective service classification and to report for induction as ordered. He does not here question the validity of the rule that a registrant must have sought administrative review of his classification before attacking it collaterally in a prosecution for failure to report for induction. *Falbo* v. *United States*, 320 U.S. 549; *Evans* v. *United States*, 252 F. 2d 509 (C.A. 9). He argues rather that his case presents a question as to whether the rule should be relaxed because of mitigating circumstances (Pet. 2-3, 6-7). He does not specify here what these mitigating circumstances were and the record reveals none.

The record shows that upon three occasions—March 1953, February 1954 and September 1955 (Ex. I, 14-15) —petitioner was notified of his I-A classification on standard forms that clearly state that a registrant has ten days in which to appeal the classification. As the court below noted, petitioner, in an unsworn statement at the time of sentencing, admitted his awareness * that

* With regard to the argument made that the "exhaustion of remedies" rule was not inflexible, the Ninth Circuit said in *Evans*, *supra*, 252 F. 2d at 511:

"* * * Assuming the correctness of this contention, we doubt that we should be anxious to relax the rule in this case where appellant makes no claim that he was not aware of his right to appeal but instead admits that the document bringing him notice of the classification also notified him of his right to take an appeal from the classification within ten days."

this information appeared on the card notices (R. 46). The record further shows that petitioner was given every opportunity to establish a conscientious objector status. The United States Attorney twice declined to prosecute and the Board regularly mailed the requisite forms to petitioner. By his own unsworn statement he was encouraged to fill out the conscientious objector form by an F.B.I. agent (R. 46). He admitted that he intentionally declined to appear as ordered or to consult anyone (R. 45, 47).

It is apparent that, even if the "exhaustion of administrative remedies" rule might properly be relaxed in a special case, this is not such a case. There is therefore no occasion to review this question.

There is no conflict of decision requiring clarification under these facts. In *Batterton* v. *United States*, 260 F. 2d 233 (C.A. 8), cited by petitioner, the registrant exhausted his administrative appeals, and the only question was whether he could challenge his classification without reporting for induction. Since petitioner in the instant case did not even take an appeal, it is unnecessary to consider here whether reporting for induction is an administrative step which necessarily must be taken before one may seek a judicial review of his classification.

2. There is no merit to petitioner's attempt to reraise the issue of the geographical jurisdiction of Local Board 71. He now urges that the government's proof—offered in refutation of his attack on such jurisdiction at the trial (despite the fact that he had registered and dealt with this Board during a four-year period)—was inadmissible over his objections (Pet. 3), and insufficient (Pet. 9). His objections go to such matters as counsel's leading of the witness (R. 25) and the

authenticity of documents (R. 26, 32). Both courts below specifically found that the documents—the legal description and the maps—were authentic and conclusive evidence of the Board's jurisdiction. Moreover, as the court below properly held, even if this were not true, petitioner would be barred from raising the issue of the Board's geographical jurisdiction because of his failure to exhaust the matter administratively.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY, 1959.